

**U.S. NATIONAL ADMINISTRATIVE OFFICE
NORTH AMERICAN AGREEMENT
ON LABOR COOPERATION**

FOLLOW-UP REPORT

NAO SUBMISSION #940003

**BUREAU OF INTERNATIONAL LABOR AFFAIRS
U.S. DEPARTMENT OF LABOR**

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I. BACKGROUND

A. Summary of Submission

Pursuant to the provisions of the North American Agreement on Labor Cooperation (NAALC), the labor supplemental agreement to the North American Free Trade Agreement (NAFTA), Submission No. 940003 was filed with the U.S. National Administrative Office (NAO) on August 14, 1994. The submitters were four human rights and workers' rights organizations: the International Labor Rights Fund (ILRF)¹, the National Association of Democratic Lawyers (ANAD)², the Coalition for Justice in the Maquiladoras, and the American Friends Service Committee (AFSC).

The allegations raised in this submission relate to the denial of freedom of association and the right to organize at the maquiladora operations of the Sony Corporation, doing business as Magnéticos de Mexico (MDM), in Nuevo Laredo, Tamaulipas, Mexico. In brief, the specific allegations involved:

1. dismissals--workers were dismissed in retaliation for union organizing activity;
2. union election--a union delegate election was flawed since there was insufficient notice of election and an open vote rather than secret ballot;
3. work stoppage--workers protesting the election in front of the plant were dispersed by police using physical force; and
4. union registration--a petition for registration of an independent union was rejected by a labor tribunal on improper and hyper-technical grounds.

In addition, the submission charged the Government of Mexico with violating its obligations under the NAALC and under Conventions 87 and 98 of the International Labor Organization (ILO), which guarantee freedom of association and the right to bargain collectively.

B. Public Report on Submission No. 940003

The NAO Public Report of Review on Submission No. 940003 was issued on April 11,

¹At the time of the original submission, the official name of the organization was the International Labor Rights Education and Research Fund (ILRERF). The name was subsequently changed to the International Labor Rights Fund (ILRF). For the sake of clarity and consistency, the latter name will be used throughout this report.

²*Asociación Nacional de Abogados Democráticos.*

1995.³ In conducting its review, the NAO “considered whether Mexico promoted compliance with, and effective enforcement of, its labor laws that guarantee the right of association and the right to organize freely and prohibit the dismissal of workers because of efforts to exercise those rights (Article 3); whether Mexico ensured that persons have appropriate access to, and recourse to, tribunals and procedures under which labor laws and collective agreements can be enforced (Article 4); and whether Mexico ensured that its tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent (Article 5).”⁴ The NAO made findings and recommendations on each allegation, focusing on the Government of Mexico’s compliance with its obligations under the NAALC.

The NAO recommended engaging in ministerial consultations pursuant to Article 22 of the NAALC on the union registration issue.⁵ The NAO’s report concluded: “Given that serious questions are raised herein concerning the workers’ ability to obtain recognition of an independent union through the registration process with the local CABs [Conciliation and Arbitration Boards] and as compliance with and effective enforcement of the laws pertaining to union registration are fundamental to ensuring the right to organize and freedom of association, the NAO recommends that ministerial consultations are appropriate to further address the operation of the union registration process.”⁶

Mexico accepted the U.S. request for ministerial consultations and an implementation

³ U.S. Department of Labor, Bureau of International Labor Affairs, U.S. National Administrative Office, North American Agreement on Labor Cooperation, Public Report of Review: NAO Submission No. 940003 (1995)(hereinafter Public Report of Review).

⁴ Public Report of Review, pp. 24-25.

⁵ Article 22 states,

1. Any Party may request in writing consultations with another Party at the ministerial level regarding any matter within the scope of this Agreement. The requesting Party shall provide specific and sufficient information to allow the requested Party to respond.
2. The requesting Party shall promptly notify the other Parties of the request. A third Party that considers it has a substantial interest in the matter shall be entitled to participate in the consultations on notice to the other Parties.
3. The consulting Parties shall make every attempt to resolve the matter through consultations under this Article, including through the exchange of sufficient publicly available information to enable a full examination of the matter.

⁶ Public Report of Review, p. 32.

agreement was signed on June 26, 1995.⁷ All the activities negotiated as part of the ministerial consultations implementation agreement were completed and related documents were published on May 10, 1996.⁸ On June 4, 1996, the NAO issued a report on the ministerial consultations conducted pursuant to Submission No. 940003.⁹

On March 29, 1996, in a letter addressed to Secretary of Labor Robert B. Reich, the submitters requested that the ministerial consultations process be re-opened.¹⁰ The request was based on the assertion that information made available during the activities conducted under ministerial consultations revealed that Mexico was not in compliance with its obligations as enunciated in Article 5, paragraphs 1 and 4 of the NAALC. The submitters argued that the local Conciliation and Arbitration Boards (CABs) are not impartial and independent in reviewing petitions for registration filed by independent unions.

Secretary Reich declined to re-open ministerial consultations. He did, however, instruct the NAO to continue to monitor developments in Mexico with respect to the union registration issues raised through ministerial consultations and prepare a follow-up report. The NAO's report was to include a summary and analysis of two May 21, 1996 Mexican Supreme Court decisions and their potential relevance to future union registration cases.¹¹ These issues are discussed below in Sections II and III, respectively.

II. REVIEW BY THE U.S. NATIONAL ADMINISTRATIVE OFFICE

In conducting its review, the NAO requested information from the Mexican NAO, the original submitters of Submission No. 940003, and the U.S. Embassy in Mexico. The review focused on (A) the current situation of the workers involved in the union organization efforts reported in Submission No. 940003 and (B) initiatives in Mexico to change the labor law.

⁷ Ministerial Consultations --Submission 940003, Agreement on Implementation.

⁸ Ministerial Consultations - Submission 940003 Agreement on Implementation, Statement on Public Release of Documents.

⁹ U.S. National Administrative Office, Report on Ministerial Consultations on NAO Submission 940003 under The North American Agreement on Labor Cooperation.

¹⁰ Letter to Secretary Robert B. Reich dated March 29, 1996, signed by representatives of the ILRF, the Coalition for Justice in the Maquiladoras, the ANAD, and the AFSC.

¹¹ Letter to Pharis Harvey, Executive Director, ILRF, dated June 7, 1996, signed by Secretary of Labor Robert B. Reich.

A. Current Status of Sony Workers

The NAO learned from a representative¹² of the Coalition for Justice in the Maquiladoras, one of the submitters, that all the workers dismissed by the Sony subsidiary in Nuevo Laredo in the events associated with this case remain unemployed. The NAO also learned, from the same representative, that the workers believe they are blacklisted and therefore unable to obtain employment anywhere in Nuevo Laredo. The representative further reported that the dismissed workers have formed a community activist group named the *Centro de Trabajadores y Comunidad Sony*. This group is supporting some of the employees in the Sony plant in an effort to challenge the established union leadership in union elections scheduled to be held in April 1997.

B. Initiatives in Mexico to Change the Labor Law

There are two initiatives in Mexico that might impact upon Mexican labor law and industrial relations.

1. Legislation

In 1995, the principal opposition party in Mexico, the National Action Party (PAN), submitted for consideration a comprehensive bill proposing to reform the Federal Labor Law (FLL) of Mexico.¹³ By expressly defining registration as a procedural formality and removing the discretionary authority currently vested in local authorities to deny registration, the bill would address many of the restrictions that arguably infringe on freedom of association rights. The removal of discretionary authority, combined with specific language on the requirements for constituting a union, also would arguably facilitate the registration of more than one union in each workplace.

The bill further proposes to transfer jurisdiction over the Federal and State Conciliation and Arbitration Boards from the Federal and State executive branches to the respective judicial branches.¹⁴ If enacted, this proposal would appear to end the current practice of appointed tripartite labor, management, and government representatives to these tribunals. It is this practice that resulted in the allegations in submissions before the NAO of inherent bias and lack of impartiality in the composition and decisions of the CABs.

¹² Telephone conversation with Martha Ojeda, representative of the Coalition for Justice in the Maquiladoras, September 25, 1996. The NAO also contacted the other submitters in the case, namely the ILRF, the AFSC, and the ANAD. These organizations had no additional information on the status of the workers.

¹³ Senate of the Republic, National Action Party Parliamentary Group, Initiative to Reform the Federal Labor Law, (1995) Articles 253-296, pp. 106-116.

¹⁴ *Ibid.*, Article 454, pp. 128-129.

This proposed legislation would address many of the issues and concerns raised by the NAO in its Report of Review of Submission No. 940003. After its proposal by the PAN, however, the bill was referred to the appropriate Senate committee where no further action has been taken.

2. Principles of the New Labor Culture (*Principios de la Nueva Cultura Laboral*)

In an effort to improve labor-management cooperation, competitiveness and productivity, the Government of Mexico promoted tripartite negotiations during 1996 that resulted, on August 13, in the signing of a document entitled Principles of the New Labor Culture, by representatives of the major labor and business organizations of the country.¹⁵ The importance attached to this document is evidenced by the signing ceremony which took place at the official residence of the President of Mexico and the considerable coverage that it received in the Mexican press.

A review of the Principles of the New Labor Culture indicates that it does not have the effect of law, but rather is a statement of objectives and principles. It calls upon both labor and management to respect each others' rights and honor respective obligations. Significant emphasis is placed on the importance of education and skills training for improving productivity, competitiveness, and workers' income. The document calls for the cooperation of workers, unions, management and government in education and training and maintains that education must occur in the home, the school, the union, and the workplace.

The document addresses two matters of labor law which were the subjects of the original Submission No. 940003 and the subsequent ministerial consultations: (1) union democracy; and (2) union registration, including the lack of impartiality in the decisions of the labor tribunals. Under the Principles of the New Labor Culture, unions pledge to conduct their business in accordance with the law, to observe the principle of freedom of association, and to conduct their elections in a climate of harmony, respect and democracy.¹⁶ Further, both unions and management call on the government to strengthen the system of labor tribunals by assigning career judges, as opposed to the current practice of assigning members of the executive branch, as the government representatives to these bodies.¹⁷

III. DECISIONS OF THE SUPREME COURT OF MEXICO

On May 21, 1996, the Supreme Court of Mexico, in two unanimous decisions, found

¹⁵ *Principios de la Nueva Cultura Laboral*, August 13, 1996, hereinafter Principles of the New Labor Culture.

¹⁶ Principles of the New Labor Culture, Articles 8.5-8.6.

¹⁷ *Ibid.*, Article 2.2.

provisions of two state statutes that prohibited employees from forming more than one union per workplace to be unconstitutional.¹⁸

In Mexico, registration by the appropriate labor tribunal is necessary for a union to have legal status (*personaría jurídica*¹⁹). A union must have legal status before it can engage in any official activities, such as contesting representation elections, representing its members in negotiations with employers or before government panels, or even representing itself in court. Registration was the central issue giving rise to ministerial consultations in the Sony Case.²⁰ In that case, one of several reasons given by the local CAB for denying the petition for registration by workers of the assembly plant was that another union was already registered at that workplace. According to the CAB, the Federal Labor Law (FLL) permitted the registration of only one union per workplace. The NAO has determined that though the FLL contains no such explicit restriction, the CABs nevertheless cite it as a basis for denial of registration.²¹

The Sony case fell under the jurisdiction of the FLL which regulates labor matters in the private sector, while the two Supreme Court decisions at issue here address state laws governing state employees. Nevertheless, all state and federal labor laws draw their authority from Article 123 of the Political Constitution of Mexico (hereinafter the Mexican Constitution). The FLL covers private sector employees and implements Section A of Article 123 of the Constitution. The Law of Federal Employees (LFE) implements Section B of Article 123 and covers employees of the Federal Government. The LFE contains a provision specifically limiting federal workers to one union per government entity.

The two instant cases arose from state laws that contained provisions similar to that of the

¹⁸ Amparo Decision 337/94, Union of Academic Personnel of the University of Guadalajara, and Amparo Decision 338/95, Solidarity Union of Employees of the State of Oaxaca and Decentralized Agencies.

¹⁹ *Personaría jurídica* is also translated as legal personality.

²⁰ Public Report of Review, p. 24.

²¹ It is important to differentiate between union registration and holding title to the collective bargaining agreement. In Mexico, a union in the private sector must obtain registration before it can obtain title to the collective bargaining agreement, which is roughly comparable to exclusive bargaining agency in the U.S. context. Essentially, it must obtain registration in order to possess the legal status necessary to challenge for title to the collective bargaining agreement. In the Federal Government, and most of the state governments that model their statutes after the Federal model, this distinction does not exist because the laws allow only one union in each workplace. Registration amounts to recognition and grants the union exclusive bargaining rights. A union without registration lacks the legal status to initiate any official action, such as challenging for bargaining agency.

LFE's prohibition of the registration of more than one union in each government entity or department. Essentially, the Supreme Court asserted the supremacy of the Mexican Constitution and concluded that it does not restrict or limit the number of unions that may be formed in the workplace. Thus, the Court concluded that it is unconstitutional for state laws, which draw their authority from the constitution, to restrict or limit the number of unions.

The immediate impact of the Court's decisions is only on those individuals and/or institutions that were parties to the appeals. In order to ascertain the implications of the decisions, including their precedential value within the Mexican system of jurisprudence, the NAO commissioned a study by experts in Mexican constitutional law. Following is a summary of that study.²²

A. Mexican Jurisprudence

The Mexican legal system requires that every law, from federal laws to individual criminal sentences to administrative decisions, and including labor law, find their source in the Mexican Constitution. Article 123, Section A, of the Mexican Constitution governs relations between employers and employees in the private sector. Section B applies to public sector employees in the federal government and in the Federal District (Mexico City). Section B, was added in 1960 and subsequently amended by decree in 1974. The implementing legislation for Section B is the Law of Federal Employees (No. 112), originally enacted in 1963.

Public employees of state governments and "decentralized federal agencies" are not covered by Section B. "Decentralized federal agencies" include the Social Security Institute, the National Housing Institute, the National Lottery, and a number of other agencies that are responsible for providing services directly to the public.²³ State and municipal employees, and employees of corporations in which the states have a controlling interest, are typically regulated by state law. Most state laws governing labor relations are modeled after the federal law.

The two cases reviewed here reached the Supreme Court of Mexico via the process of *amparo* suit. The *amparo* suit is most often used to bring a complaint of a violation of constitutional guarantees. A decision rendered in an *amparo* suit, which may declare that a violation of constitutional guarantees has occurred, affects only the parties to the suit. The decision

²² Anna Torriente, National Law Center for Inter-American Free Trade, Tucson, Arizona, Study of Mexican Supreme Court Decisions Concerning the Rights of State Employees to Organize in the States of Jalisco and Oaxaca, (U.S. Department of Labor, Bureau of International Labor Affairs, U.S. National Administrative Office, North American Agreement on Labor Cooperation, November, 1996).

²³ Article 1, Law 112, Federal Law of Employees in the Service of the State, Regulating Section B of Article 123.

is not binding on the lower courts. Mexico follows a judicial formula in which only the successful petitioner in an *amparo* case is exempted from the application of the challenged law.

To establish *stare decisis*²⁴ the Mexican Supreme Court must issue five consecutive decisions *en banc* on the same point. Jurisprudence may also be created by a single decision of the Mexican Supreme Court where the Court's decision resolves conflicting opinions of the Collegiate Circuit Tribunals (approximately equivalent to U.S. Circuit Courts). While such jurisprudence should theoretically be followed by the lower courts, it does not have the same force as *stare decisis* in the United States. Jurisprudence can be interrupted or modified when the Court, acting *en banc*, issues a judgement which contradicts previously established precedent.

Under constitutional reforms initiated by President Zedillo in 1994, a new law was passed which enables a statute to be nullified (except in electoral matters) when it is deemed unconstitutional.²⁵ Basically, the Supreme Court will accept actions to declare a challenged statute null and void if brought by any one of the following: (1) at least 33% of the members of the Chamber of Deputies in the case of federal laws; (2) at least 33% of members of the Senate in the case of federal laws, (3) the Nation's Attorney General in the case of federal laws and international treaties; (4) at least 33% of the members of the local congresses in the case of state laws; or (5) at least 33% of the members of the local Assembly of the Federal District in the case of Assembly laws. These challenges must be brought within thirty days of the publication of the challenged statute, however, and would therefore be limited to legislation enacted after the passage of this law. A minimum of eight of the eleven justices must concur in a finding of unconstitutionality.

B. The Cases and Decisions

The first of the two cases arose when academic staff of the University of Guadalajara in Jalisco State attempted to form a union. Their petition for registration was denied by the State Arbitration and Employee Classification Board on the ground that another union was already registered at the university. The Board cited Article 76 of the Law on Public Servants of the State of Jalisco and its Municipalities,²⁶ which provides that there can be no more than one union in each governmental body, municipal agency, or decentralized agency or in firms or associations of state or municipal majority participation.

²⁴ The Spanish word used in Mexican legal terminology is *jurisprudencia*, hereinafter translated as jurisprudence in this report.

²⁵ Decree Amending the Constitution of the United Mexican States, *Diario Oficial de la Federación*, December 31, 1994.

²⁶ Article 76, Law of Public Employees in the State of Jalisco and its Municipalities, promulgated on March 22, 1984.

The Supreme Court, in its decision, upheld the finding of the lower court, and ruled that Article 76 of the State law was unconstitutional in that, by limiting the number of unions that may be formed in a government workplace of the state, the state interfered with the petitioner's constitutional rights of association and organization. The Court further invoked Convention 87 of the International Labor Organization (ILO) on freedom of association which was ratified by Mexico in 1950. Although there are conflicting viewpoints on the issue of what position international treaties occupy in the hierarchy of Mexican law, the Court found that the state law also conflicts with the freedom of association provisions of Convention 87.

The Court concluded that the spirit of Article 123 of the Mexican Constitution was to uphold freedom of association in a universal sense. As such, laws issued by State legislatures to govern labor relations must conform to this principle.

The second of the two cases arose from an *amparo* petition filed by state employees of the state of Oaxaca. The facts were similar to those in the Guadalajara case. A group of state employees formed a union and the Arbitration Board for Oaxaca State Employees denied their application for registration on the ground that another union was already registered at the workplace. In this case, the Supreme Court found that the law in Oaxaca did not prohibit more than one government union in each workplace and, therefore, the Arbitration Board's decision was incorrect. However, the Court did cite its analysis of the Guadalajara decision and indicated that its reasoning in that decision was fully applicable to the facts in the Oaxaca case.

C. Potential Impact

These two decisions are significant because they signal a departure from a restriction on the right to organize that has existed in the government workplace since 1963. As discussed above, the decisions do not constitute binding jurisprudence. However, the decisions may potentially encourage an increase in *amparo* suits filed against similar one union per workplace restrictions. This could result in the establishment of jurisprudence after five consecutive decisions. The fact that the Court issued two decisions on this point in one day may be an indication that it would rule the same way on future suits challenging similar state laws or against the restrictions contained in the LFE. This indication is strengthened by the fact that the Court cited its Guadalajara decision in the Oaxaca case, instead of attempting to distinguish the two cases and thereby weakening the effect of the ruling. Finally, even if the two cases do not eventually become binding jurisprudence, there is a tendency in Mexico for lower courts to follow high court decisions as persuasive law.

The decisions also may potentially impact on private sector employment. While the FLL does not contain any restrictions prohibiting private sector employees from forming more than one union per workplace, numerous CAB decisions have denied registration of private sector unions on that basis.²⁷ Further, the decisions may have a potential impact on the use of exclusion clauses in

²⁷ See U.S. National Administrative Office, Public Report of Review.